No. 18-966

In The
Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL.,

Petitioners,

v.

NEW YORK, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF JOHN R. DUNNE, BILL LANN LEE, THOMAS E. PEREZ, JAMES P. TURNER, WILLIAM R. YEOMANS, AND LORETTA KING AS *AMICI CURIAE* FOR RESPONDENTS

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TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. Block-Level Citizenship Data Will Not Meaningfully Facilitate Enforcement of the Voting Rights Act	6
II. Adding a Citizenship Question to the Decennial Census Will Likely Undermine the Operation of the Voting Rights Act	15
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES:

Benavidez v. Irving Indep. Sch. Dist., 690 F. Supp. 2d 451 (N.D. Tex. 2010) 13, 14

Cisneros v. Pasadena Indep. Sch. Dist., No. 4:12-CV-2579, 2014 WL 1668500 (S.D. Tex. Apr. 25, 2014) 11, 14

Cooper v. Harris, 137 S. Ct. 1455 (2017) 10, 18

Fabela v. City of Farmers Branch, No. 3:10-CV-1425-D, 2012 WL 3135545 (N.D. Tex. Aug. 2, 2012) 12

Fed'n for Am. Immigration Reform v. Klutznick, 486 F. Supp. 564 (D.D.C. 1980) 15, 16

League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) 8

Luna v. Cty. of Kern, 291 F. Supp. 3d 1088 (E.D. Cal. 2018) 9

Montes v. City of Yakima, 40 F. Supp. 3d 1377 (E.D. Wash. 2014) 10

Negron v. City of Miami Beach, 113 F.3d 1563 (11th Cir. 1997) 8

Patino v. City of Pasadena, 230 F. Supp. 3d 667 (S.D. Tex. 2017) 10, 14

Rios-Andino v. Orange Cty., 51 F. Supp. 3d 1215 (M.D. Fla. 2014) 10, 14

Rodriguez v. Harris Cty., 964 F. Supp. 2d 686 (S.D. Tex. 2013), aff'd, 601 F. App'x 255 (5th Cir. 2015) 11

TABLE OF AUTHORITIES – Continued

Page

Thornburg v. Gingles, 478 U.S. 30 (1986) ... 4, 5, 9, 11, 18

Valdespino v. Alamo Heights Indep. Sch. Dist., 168 F.3d 848 (5th Cir. 1999), cert. denied, 528 U.S. 1114 (2000) 8

STATUTES AND RULES:

Voting Rights Act, 52 U.S.C. § 10301 *et seq.* ..... *passim*

Pub. L. No. 94-73 § 206, 89 Stat. 400 (Aug. 6, 1975) 8

Pub. L. No. 97-205 § 3, 96 Stat. 131 (June 29, 1982) 8

S. Ct. R. 37.6 1

OTHER AUTHORITIES:

Enumeration of Undocumented Aliens in the Decennial Census: Hearing Before the Subcomm. on Energy, Nuclear Proliferation, and Gov't Processes of the S. Comm. on Gov'tl Affairs, 99th Cong. 23 (1985) 16, 17

Memorandum for Associate Directorate for Research and Methodology from Center for Survey Measurement, *Respondent Confidentiality Concerns* (Sept. 20, 2017), https://perma.cc/8JZ6-KJLS 17, 18

Testimony of Professor Justin Levitt Before the House Comm. on Oversight and Gov't Reform, *Progress Report on the 2020 Census* (May 8, 2018), https://perma.cc/7FV6-GXEF 9, 18, 19

INTEREST OF THE *AMICI CURIAE*[1]

Amici are former heads of the Civil Rights Division of the United States Department of Justice. The Civil Rights Division is the component of the Justice Department with responsibility for enforcing the Voting Rights Act, 52 U.S.C. § 10301 *et seq.* *Amici* led the Division in both Republican and Democratic administrations.

As former leaders of the Civil Rights Division, *Amici* have a particularly strong interest in this case. The sole reason offered by Secretary Ross at the time he added a citizenship question to the decennial census was that the data gathered by such a question would advance the Division's interest in enforcing the Voting Rights Act. Based on their experience leading the Division during periods spanning several decades, *Amici* find that justification implausible. Adding a citizenship question to the decennial census will not materially facilitate the enforcement of the Voting Rights Act. But it will deter Latino and other voters from responding to the census. The result will be to undermine enforcement of the Act.

Amici file this brief to put before the Court the conclusions they draw from their long voting rights experience.

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[1] Pursuant to S. Ct. R. 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* or their counsel made a monetary contribution to its preparation or submission. All parties have filed blanket consents to the filing of *amicus curiae* briefs in this case.

Amici are:

John R. Dunne served as Assistant Attorney General for Civil Rights from 1990 to 1993.

Bill Lann Lee served as Acting Assistant Attorney General for Civil Rights, and then Assistant Attorney General for Civil Rights, from 1997 to 2001.

Thomas E. Perez served as Assistant Attorney General for Civil Rights from 2009 to 2013. He was Deputy Assistant Attorney General from 1998 to 1999, and a Trial Attorney, then Deputy Chief of the Criminal Section, from 1989 to 1995.

James P. Turner served as the career Deputy Assistant Attorney General for Civil Rights from 1969 to 1994. He served as Acting Assistant Attorney General during several administrations, including two stints of more than one year: from 1989 to 1990, and from 1993 to 1994. From 1965 to 1969, he was a Trial Attorney.

William R. Yeomans served in the Civil Rights Division from 1981 to 2005. He served as Acting Assistant Attorney General, Chief of Staff, Acting Deputy Assistant Attorney General, Counsel to the Assistant Attorney General, Deputy Section Chief, and Trial Attorney.

Loretta King served as Acting Assistant Attorney General for Civil Rights in 2009. She served as Deputy Assistant Attorney General from 1994 to 2011. She was Deputy Chief of the Voting Section from 1992 to 1994, and a Trial Attorney from 1980 to 1990.

SUMMARY OF ARGUMENT

Defendants assert that their addition of a citizenship question to the decennial census was driven by a desire to facilitate enforcement of the Voting Rights Act. The district court found that explanation pretextual. Based on their experience leading the Civil Rights Division of the Department of Justice, *Amici* agree. Throughout the life of the Voting Rights Act, the census "short form" has *never* included a question about citizenship. Yet the lack of block-level citizenship data has never perceptibly impeded the enforcement of the statute. And the very act of asking a citizenship question on the census short form is likely to suppress the response rate from Latinos and other minorities, thus making it harder to enforce their rights under the statute. Far from being "critical" to enforcing the Voting Rights Act, then, a citizenship question is more likely to undermine that law's operation.

I. Block-level citizenship data will not meaningfully facilitate enforcement of the Voting Rights Act. From the initial enactment of the Voting Rights Act in 1965 through the most recent decennial census in 2010, the census's "short form" has *never* asked respondents about their citizenship. And, until the events that triggered this case, the Department of Justice never asked the Census Bureau to add such a citizenship question. That is because other sources of information provide fully sufficient citizenship information to enable enforcement of the Voting Rights Act. Those sources include, most notably, the decennial census "long form" in use through 2000 and the annual

American Community Survey (ACS) compilation that began in 2005. Courts routinely use the ACS citizenship data to determine whether plaintiffs have proven their cases under the Voting Rights Act—and in particular, to determine whether plaintiffs have established the three preconditions for a vote-dilution violation under *Thornburg v. Gingles*, 478 U.S. 30 (1986). Neither the 2017 Department of Justice letter, nor the 2018 Department of Commerce memorandum announcing the addition of a citizenship question—nor even any of the top-side briefs in this case—can identify a single Voting Rights Act case in which the availability of citizenship data from the decennial census would have changed the outcome.

II. Adding a citizenship question to the decennial census will likely undermine the operation of the Voting Rights Act. A citizenship question is likely to suppress the count of Latinos and other minorities. The result will be actually to *undermine* the interests served by the Voting Rights Act. The Census Bureau long opposed addition of a citizenship question to the "short form" for fear of suppressing the count of minority respondents. If anything, the evidence indicates that the risk involved with adding a citizenship question is even greater today. The inclusion of a citizenship question is likely to deter individuals from responding to the census. Those individuals will fall disproportionately in groups with large numbers of immigrants, particularly in the Latino, Arab, and South Asian communities. And those individuals will include both citizens and non-citizens. The result will

be to undermine enforcement of the Voting Rights Act. If Latinos and other minorities disproportionately fail to respond to the census, members of these communities who actually *satisfy* the first *Gingles* precondition for establishing liability—the ability to form a majority in a compact district—will have a harder time *proving* it.

The long experience of the Department of Justice demonstrates that the addition of a citizenship question to the census "short form" will undermine, rather than advance, the enforcement of the Voting Rights Act. That fact supports the district court's conclusion that the Government's VRA justification was a pretext.

ARGUMENT

This case challenges the decision of Commerce Secretary Wilbur Ross to add a citizenship question to the decennial census. Defendants assert that the motivation for adding the question was benign—that the Department of Justice sought addition of the question to promote the enforcement of the Voting Rights Act. They rely on a 2017 letter from DOJ, which said that the incremental data revealed by adding a citizenship question to the decennial enumeration of every household would be "critical to the Department's enforcement of Section 2 of the Voting Rights Act and its important protections against racial discrimination in voting." Pet. App. 564a.

The district court found that the "stated rationale, to promote VRA enforcement, was pretextual." Pet. App. 10a. See also Pet. App. 123a (finding "that promoting enforcement of the VRA was *not* [Secretary Ross's] real reason" but was instead "a *post hoc* rationale for a decision that [the] Secretary had already made for other reasons"). Based on their experience leading the Civil Rights Division of the Department of Justice, *Amici* agree. Throughout the life of the Voting Rights Act, the census "short form" has *never* included a question about citizenship. Yet the lack of block-level citizenship data has never perceptibly impeded the enforcement of the statute. And the very act of asking a citizenship question on the census short form is likely to suppress the response rate from Latinos and other minorities, thus making it harder to enforce their rights under the statute. Far from being "critical" to enforcing the Voting Rights Act, then, a citizenship question is more likely to undermine that law's operation.

I. Block-Level Citizenship Data Will Not Meaningfully Facilitate Enforcement of the Voting Rights Act

In its 2017 letter requesting the addition of a citizenship question to the decennial census, DOJ noted that "Census data is reported to the census block level, while the smallest unit reported in the ACS [the annual American Community Survey] estimates is the census block group." Pet. App. 568a. The letter argued that "in order to assess and enforce compliance with

Section 2's protection against discrimination in voting the Department needs to be able to obtain citizen voting-age population data for census blocks." *Id.* at 566a.

Despite the statements in that letter, the experience of the Department of Justice is to the contrary. And, indeed, Acting Assistant Attorney General John Gore, the (uncredited) "principal drafter" of that letter, admitted in his deposition "that he believes 'that CVAP [citizen voting-age population] data collected through the census questionnaire is not necessary for DOJ's VRA enforcement efforts.'" Pet. App. 94a-95a.

From the initial enactment of the Voting Rights Act in 1965 through the most recent decennial census in 2010, the census's "short form" has *never* asked respondents about their citizenship. Pet. App. 27a-28a. And, until the events that triggered this case, the Department of Justice never asked the Census Bureau to add such a citizenship question. See Pet. App. 94a (quoting trial testimony that "prior to December 2017 . . . , the Census Bureau had never heard from the Department of Justice that existing CVAP data . . . was not ideal for purpose of DOJ's VRA enforcement work") (ellipses in district court opinion).

The Department of Justice's position was consistent across nine different presidential administrations—four headed by Democrats and five headed by Republicans. It was consistent even after:

- Congress added explicit protection of language minorities to the statute in 1975,

Pub. L. No. 94-73 § 206, 89 Stat. 400 (Aug. 6, 1975);

- Congress codified protections against vote dilution in 1982, Pub. L. No. 97-205 § 3, 96 Stat. 131 (June 29, 1982);
- Lower courts looked to citizen voting-age population to determine whether a violation of the statute existed, *e.g.*, *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 850 (5th Cir. 1999), cert. denied, 528 U.S. 1114 (2000); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1571 (11th Cir. 1997); and
- This Court itself looked to citizen voting-age population to determine whether a violation of the statute existed, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006).

During this time, the Department of Justice supported numerous efforts to facilitate voting rights enforcement, including multiple reauthorizations of the VRA itself. If block-level citizenship data had been necessary—or even particularly helpful—to enforce the Voting Rights Act, one would expect the Department to have sought such data at some point before 2017. But "until Secretary Ross and his senior aides planted the seed, DOJ had never before cited a VRA-related need for citizenship data from the decennial census; never before asserted that it had failed to bring or win a VRA case because of the absence of such data; and never before claimed that it had been hampered in any way by

relying on citizenship estimates obtained from sample surveys." Pet. App. 124a-125a.

The lack of any request from DOJ for a citizenship question on the census "short form," at any point between 1965 and 2017, speaks powerfully as a dog that did not bark. And there is a reason why the Department did not, in over 50 years, ask the Census Bureau to add such a question: Other sources of information provide fully sufficient citizenship information to enable enforcement of the Voting Rights Act. Those sources include, most notably, the decennial census "long form" in use through 2000 and the annual ACS that began in 2005. Testimony of Professor Justin Levitt Before the House Comm. on Oversight and Gov't Reform, *Progress Report on the 2020 Census* (May 8, 2018) [hereinafter "Levitt Testimony"] at 16, https://perma.cc/7FV6-GXEF. And those sources provide sufficient citizenship information without causing the harms that addition of a citizenship question to the census "short form" would. See Part II, *infra*.

Courts routinely use the ACS citizenship data to determine whether plaintiffs have proven their cases under the Voting Rights Act—and in particular, to determine whether plaintiffs have established the three preconditions for a vote-dilution violation under *Gingles*, *supra*.[2] See, *e.g.*, *Luna v. Cty. of Kern*, 291 F. Supp. 3d

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[2] This Court recently restated the *Gingles* preconditions:

> First, a "minority group" must be "sufficiently large and geographically compact to constitute a majority" in some reasonably configured legislative district. Second, the minority group must be "politically cohesive." And

1088, 1106 (E.D. Cal. 2018) (finding Voting Rights Act violation for Latino plaintiffs where illustrative districts were based on "data from the 2010 decennial census for total population and voting age population by race and ethnicity, and data from the 2005–2009 and 2011–2014 ACS Special Tabulations for citizen voting age population"); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 689 (S.D. Tex. 2017) (relying on ACS five-year data to "estimate[] citizen voting-age population in individual Council districts" in a small city in Texas); *Rios-Andino v. Orange Cty.*, 51 F. Supp. 3d 1215, 1225 (M.D. Fla. 2014) (relying on ACS five-year data to conclude that plaintiffs had not identified a compact district in which Latinos could be a citizen voting-age majority)[3]; *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1393 (E.D. Wash. 2014) (relying on ACS data to conclude that plaintiffs had established their burden of showing that Latinos could make up a citizen voting-age majority in a compact district);

> third, a district's white majority must "vote[] sufficiently as a bloc" to usually "defeat the minority's preferred candidate."

Cooper v. Harris, 137 S. Ct. 1455, 1470 (2017) (citations omitted; quoting *Gingles*, 478 U.S. at 50-51).

[3] One of the Government's *amici* suggest that *Rios-Andino* was a case in which the lack of block-level data impeded enforcement of the VRA. See Proj. Fair Rep. Br. 10-11. Not so. The *Rios-Andino* court specifically found that the analysis of the defendant's expert, which relied on "five-year ACS Latino citizenship rates," was "more reliable" than that of the plaintiff's expert. *Rios-Andino*, 51 F. Supp. 3d at 1225. The court simply concluded, based on the defendant's expert's testimony, that Latinos could not make up a CVAP majority in a compact district. See *id.*

Cisneros v. Pasadena Indep. Sch. Dist., No. 4:12-CV-2579, 2014 WL 1668500, at *9 (S.D. Tex. Apr. 25, 2014) ("ACS's five-year estimates of CVAP are reliable for the purposes of a Section 2 analysis."); *Rodriguez v. Harris Cty.*, 964 F. Supp. 2d 686, 728 (S.D. Tex. 2013) (concluding that "the five-year aggregated ACS citizenship data is sufficiently probative on the issue of citizen voting age population and Plaintiffs may rely upon this data in establishing the first *Gingles* precondition," but finding that plaintiffs had nonetheless failed to establish that precondition), aff'd, 601 F. App'x 255 (5th Cir. 2015). One of the *Government's* own *amici* tellingly devotes several pages of its brief to discussing lower-court cases that relied on the ACS data in granting relief under the VRA. RNC Br. 22-26.

A recent review of 18 years of Voting Rights Act enforcement by the Department of Justice, "across both Republican and Democratic Administrations, spanning two decades' worth of 'long form' and ACS data," could not find *a single case* "in which a decennial enumeration would have enabled enforcement that the existing survey data on citizenship did not permit." Levitt Testimony 18. Indeed, it could not find even one case that was "realistically . . . close to the line." *Id.*

Neither the 2017 Department of Justice letter, nor the 2018 Department of Commerce memorandum announcing the addition of a citizenship question—nor even any of the top-side briefs in this case—can identify a single case brought by the DOJ *or* a private plaintiff in which the availability of citizenship data from the decennial census would have changed the outcome.

See Pet. App. 295a (2017 DOJ letter fails to "identify a single VRA case that DOJ failed to bring or lost because of inadequate block-level CVAP data").

Even in smaller jurisdictions, where the lack of block-level citizenship data would presumably present the most significant issues, existing data has proved sufficient to enforce the Voting Rights Act. For example, in *Fabela v. City of Farmers Branch*, No. 3:10-CV-1425-D, 2012 WL 3135545 (N.D. Tex. Aug. 2, 2012), the evaluation of the plaintiff's claim required considering data at the block level. The plaintiff's expert "could not aggregate only whole block groups to create an illustrative district that would allow it to have equal population with the four other districts in Farmers Branch; four-block groups made the illustrative district too small, and five-block groups made it too large." *Id.* at *5. The expert cross-checked ACS results against the number of Spanish-surnamed registered voters (SSRV) in each block—"a count of actual registered voters rather than an estimate based on a sample of the population." *Id.* at *7. The court concluded that "[b]ecause the number of SSRV can be calculated at the block level with precision, there is no uncertainty caused by having to proportionally allocate block group data among the blocks." *Id.* Cf. J.A. 107 (observing that "most analysts and the DoJ use statistical modeling methods to produce the block-level eligible voter data that become one of the inputs to their processes").

To be sure, in some cases in which Voting Rights Act plaintiffs have relied on ACS citizenship data, courts have found the data insufficient to support the

plaintiffs' claims. But citizenship data collected at a decennial census would not have helped. For example, some of the Government's *amici* point to *Benavidez v. Irving Indep. Sch. Dist.*, 690 F. Supp. 2d 451 (N.D. Tex. 2010). See Proj. Fair Rep. Br. 11; RNC Br. 21. In *Benavidez*, Latino citizen voting-age population was not sufficient at the time of the decennial census to make up a majority in the relevant district. See *id.* at 456. The plaintiffs argued that, given population growth, the court could nonetheless project that Latino citizens did make up a majority in that district by the time of litigation. See *id.* at 457. The court found that argument unsupported by the testimony. In particular, the plaintiffs' projections rested on several "critical assumptions: that the growth rate for the entire district applies uniformly throughout the district, applies forward into 2008, and applies specifically in the illustrative districts." *Id.* at 458-459. But the plaintiffs had "not presented evidence to support these assumptions, and defendants ha[d] adduced persuasive evidence to the contrary." *Id.* at 459. And the court found that projections of the growth rate in such a small district were too sensitive to the margin of error to be reliable—particularly because the plaintiff relied on ACS data from only a single year. See *id.* (concluding that "Benavidez has failed to prove that the 2007 ACS one-year data are sufficiently reliable to overcome the presumption that the 2000 Census is correct").

Because the *Benavidez* plaintiffs relied on Latino population growth that allegedly *postdated* the most recent decennial census, reliance on decennial census

numbers would not have changed the outcome of their case. And the court's decision does not suggest that ACS data is inappropriate for use in small jurisdictions. Rather, it suggests only that the use of *single-year* ACS data is inappropriate. The court itself explained that the Census Bureau's ACS Guide "makes clear that the substitute for small populations is actually the three-year and five-year pooled data, not one-year data." *Id.* at 464. Cf. *Patino*, 230 F. Supp. 3d at 688 (relying on ACS five-year data and noting that "[t]he margin of error for the five-year data is less than half that of the one-year data"); *Rios-Andino*, 51 F. Supp. 3d at 1224 (concluding that "the ACS offers meaningful data about a large community, such as Orange County, every year, but can only provide useable data for small communities in five-year increments"); *Cisneros*, 2014 WL 1668500, at *8 ("The Census Bureau increases the reliability of its estimates for small political units by pooling together five years of data for any area with fewer than 20,000 people.").

The existing ACS citizenship data thus enable full enforcement of the Voting Rights Act. Although the Justice Department's 2017 letter may have identified some *theoretical* concerns with relying on the existing citizenship data, those concerns have not ripened into any actual problems in practice during the 54 years since enactment of the VRA. The many decades of experience without block-level census citizenship data provide no basis for the 2017 letter's assertion that such data would be "critical to the Department's enforcement of Section 2 of the Voting Rights Act." Pet.

App. 564a. Notably, in his deposition below "AAAG Gore admitted that he did not know whether citizenship data obtained through the census would in fact be 'more precise than the CVAP data on which DOJ is currently relying for purposes of VRA enforcement.'" Pet. App. 95a.

As we have shown, DOJ's experience demonstrates that a citizenship question on the decennial census would *not* aid the Department's enforcement efforts. That experience supports the district court's conclusion that the VRA justification for adding a citizenship question was a pretext.

II. Adding a Citizenship Question to the Decennial Census Will Likely Undermine the Operation of the Voting Rights Act

The citizenship question will not aid DOJ's enforcement efforts. But the addition of that question will not have a merely neutral effect. To the contrary, a citizenship question is likely to suppress the count of Latinos and other minorities. The result will be actually to *undermine* the interests served by the Voting Rights Act. Those consequences, too, support the district court's conclusion that the purported VRA justification is a pretext.

Until the 2018 memorandum that prompted this litigation, the Census Bureau had long taken the position that asking all respondents on the decennial census about their citizenship "will inevitably jeopardize the overall accuracy of the population count." *Fed'n for*

Am. Immigration Reform v. Klutznick, 486 F. Supp. 564, 568 (D.D.C. 1980). See Pet. App. 28a ("Since 1950, the Census Bureau and former Census Bureau officials have consistently opposed periodic proposals to resume asking a citizenship question of every census respondent."). A federal court described the Bureau's position nearly four decades ago: "Obtaining the cooperation of a suspicious and fearful population would be impossible if the group being counted perceived any possibility of the information being used against them. Questions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate." *Fed'n for Am. Immigration Reform*, 486 F. Supp. at 568. See also *id.* (finding the Bureau's argument "supported by the amicus brief of the Mexican-American Fund, which has described for us the fears of persecution, particularly in Hispanic communities which it says would be exacerbated by" adding citizenship inquiries to the decennial census).

In 1985, the Director of the Census Bureau testified before Congress that asking a citizenship question on the census short form would place the Bureau at risk "of being perceived as an enforcement agency." *Enumeration of Undocumented Aliens in the Decennial Census: Hearing Before the Subcomm. on Energy, Nuclear Proliferation, and Gov't Processes of the S. Comm. on Gov'tl Affairs*, 99th Cong. 23 (1985) (testimony of John Keane). That perception, he testified, would deter *both citizens and noncitizens* from cooperating with the census; it would therefore reduce the accuracy of the

count. See *id.* See generally Pet. App. 28a-29a (collecting similar statements from current and former Census Bureau officials in 1988, 1989, 2005, and 2016).

If anything, the risk involved with adding a citizenship question is even greater today. In 2017, the Census Bureau's Center for Survey Measurement reported that its researchers had "noticed a recent increase in respondents spontaneously expressing concerns about confidentiality in some of our pretesting studies." Memorandum for Associate Directorate for Research and Methodology from Center for Survey Measurement, *Respondent Confidentiality Concerns* (Sept. 20, 2017) at 1, https://perma.cc/8JZ6-KJLS. Those researchers "heard respondents express new concerns about topics like the 'Muslim ban,' discomfort 'registering' other household members by reporting their demographic characteristics, the dissolution of the 'DACA' (Deferred Action for Childhood Arrival) program, repeated references to Immigration and Customs Enforcement (ICE), etc." *Id.* Confidentiality concerns were "particularly" salient "among immigrant respondents." *Id.* The Bureau's field representatives "reported that many Spanish-speaking respondents distrust the statement on confidentiality in the survey mailing materials." *Id.* at 4. The Center for Survey Measurement found these reports "particularly troubling given that they impact hard-to-count populations disproportionately, and have implications for data quality and nonresponse." *Id.* at 7.

The inclusion of a citizenship question, then, is likely to deter individuals from responding to the

census. Those individuals will fall disproportionately in groups with large numbers of immigrants, particularly in the Latino, Arab, and South Asian communities. See *id.* at 1-7. The result will be to suppress the count of members of these groups. And it is not just noncitizens whom the census will fail to count. Because the census provides one questionnaire to each household, citizens who live in a household with one or more noncitizens are likely not to be counted. See Levitt Testimony 11 ("Citizen householders concerned for family and nonfamily members at home or in the broader community, or who are simply concerned that they may be profiled more generally, may resolve to avoid the enumeration; citizen children living with parents or caregivers are also at risk of being left out."). As the district court found, "Defendants' own documents and expert witness confirm that adding a citizenship question to the census will result in a significant reduction in self-response rates among noncitizen and Hispanic households." Pet. App. 9a. The result will be "an undercount of certain sectors of the population, including people who live in households containing noncitizens and Hispanics." *Id.*

Such an undercount will likely undermine enforcement of the Voting Rights Act. If Latinos and other minorities disproportionately fail to respond to the census, members of these communities who actually *satisfy* the first *Gingles* precondition for establishing liability—the ability to form a majority in a compact district—will have a harder time *proving* it. See *Cooper*, 137 S. Ct. at 1470.

Although Defendants assert that adding a citizenship question to the decennial census is designed to facilitate the enforcement of the Voting Rights Act, the result is likely to be precisely the opposite. In a purported effort to address a theoretical problem that has not been realized in practice, the government will have imposed a significant new obstacle to voting rights litigation. "If the problem with the ACS survey is that it occasionally leaves doubt whether a population is sufficiently sizable to merit VRA protection, asking the question on the decennial enumeration will likely drive down participation so that it appears certain that the population is not sufficiently sizable to merit VRA protection. And because of the undercount, that certainty will be false." Levitt Testimony 20.

The long experience of the Department of Justice demonstrates that the addition of a citizenship question to the census "short form" will undermine, rather than advance, the enforcement of the Voting Rights Act. That fact supports the district court's conclusion that the Government's VRA justification was a pretext.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted.

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